STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEXTER EARL,

Defendant-Appellant.

UNPUBLISHED
January 24, 2003

No. 234906
Wayne Circuit Court
LC No. 00-006664

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with a person under thirteen years of age). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of twenty to forty years' imprisonment. Defendant appeals as of right. We affirm.

I. Defendant Waived Production of David Earl

Defendant argues that the trial court erred in concluding that he waived his right to the production of David Earl as a witness for trial. We disagree. A trial court's determination regarding whether a defendant waived production of a witness is a mixed question of fact and law. What constitutes a waiver is a question of law that is reviewed de novo. See *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000) (the meaning of a "knowing and intelligent" waiver of *Miranda*[1] rights is a question of law that is reviewed de novo). A trial court's decision whether the facts of a particular case demonstrate a valid waiver is reviewed for clear error. MCR 2.613(C); see also *Daoud*, *supra* at 629 (a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights are reviewed for clear error).

Waiver is defined as "the 'intentional relinquishment or abandonment of a known right.' " *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). A defendant waives his rights when he clearly expresses satisfaction with the trial court's decision. *Carter*, *supra* at 215-219. One who waives his rights may not then seek appellate review of a claimed deprivation of those rights, for his

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

waiver " 'has extinguished any error.' " *Id.* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Where a defendant waives his rights, there is no "error" to review. *Carter, supra* at 219.

In the present case, the prosecution indicated before trial that it could not locate David Earl and moved to strike him as a witness. In response, defense counsel stated, "Your honor, I have been informed of the witness list changes. We have no objection to that." The trial court then granted the prosecution's motion to strike David Earl from the witness list. Later, during the trial, defense counsel objected to David Earl being stricken from the witness list. Defense counsel argued that David Earl had not been "officially" stricken from the witness list because defendant himself did not consent to striking David Earl from the witness list. Defense counsel then stated, "I suppose when I did make the indication that I had no objection, I thought that my client was going to consent [to] that. Apparently he was [sic] not. For his sake I would ask that his brother be added to the witness list." The trial court denied defendant's request to add David Earl to the witness list, determining that defendant had waived his right to confront David Earl. The trial court found that "the record is clear there was a waiver yesterday of David Earl in that the defense did agree to the striking of David Earl from the list." The trial court indicated that it had observed defendant talking with defense counsel immediately before defense counsel's statement on the record that there was no objection to striking David Earl from the witness list. The trial court concluded that defense counsel's waiver was made with defendant's consent and denied defendant's request to put David Earl back on the witness list.

We conclude that it was not necessary for defendant to personally waive his right to call David Earl as a witness. Waiver of the right to confront a witness is a trial tactic that is within the province of counsel. *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976). A waiver of the right to confront witnesses does not have to be made personally by the defendant when he is represented by counsel. *Id.* Therefore, although defendant did not personally waive his right to call David Earl as a witness, defense counsel validly waived this right for him.[2] Moreover, there is no indication that the trial court's factual finding that defendant waived his right to call David Earl was clearly erroneous.[3]

II. Amendment of the Information

Defendant next argues that the trial court abused its discretion in permitting the prosecution to amend Count II of the information at the close of proofs. We disagree. A trial court's decision to allow the prosecution to amend the information is reviewed for an abuse of discretion. *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998). The court may permit

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[2] Defendant cites *People v Pasley*, 419 Mich 297; 353 NW2d 440 (1984), *People v Gasco*, 144 Mich App 369; 375 NW2d 453 (1985), vacated 424 Mich 862 (1985), and *People v Quick*, 114 Mich App 532; 319 NW2d 362 (1982), in support of his argument. However, these cases do not involve a defendant's waiver of his right to the production of witnesses and are not applicable to this case.

[3] In light of our conclusion that defendant waived his right to the production of David Earl, we need not address defendant's argument that the prosecution failed to exercise due diligence in attempting to locate David Earl and call him as a witness.

the prosecution to amend an information at any time before, during, or after trial unless the proposed amendment would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *People v Jones*, 252 Mich App 1, 4; 650 NW2d 717 (2002).

In *People v Willett*, 110 Mich App 337, 342; 313 NW2d 117 (1981), remanded 414 Mich 970 (1982), this Court concluded that the trial court erred in allowing the prosecution to amend the information. In *Willett, supra* at 343, the defendant was originally charged with CSC I under subsection (c), criminal sexual conduct in the course of committing another felony (breaking and entering with the intent to commit another felony). At the close of proofs, the trial court allowed the prosecution to amend the information to charge the defendant with CSC I under subsection (f), which required a showing of personal injury to the victim and a showing that force or coercion was used to accomplish the sexual penetration. *Id.* At the trial, the parties had almost ignored the element of personal injury. *Id.* at 343-344. This Court held that the defendant was prejudiced by the amendment because it denied him the opportunity to present evidence to disprove the element of personal injury to the victim. *Id.* at 344. This Court explained that the defendant "was not apprised of nor given the opportunity to defend against the crime for which he was ultimately charged." *Id.*[4]

The present case is distinguishable from *Willett*. In the present case, the information was not amended to charge defendant with a different crime or a different subsection of CSC I. Defendant was originally charged in Count II with digitally penetrating the victim's anus. At trial, however, the evidence showed that defendant penetrated the victim's anus with his tongue rather than his finger. The trial court permitted the prosecution to amend the information to show that defendant penetrated the victim's anus with his tongue rather than his finger. The original information put defendant on notice that he was being charged with sexually penetrating the victim's anus and that the victim was under thirteen years old. Because the amended information did not change the crime for which defendant was charged and only changed the body part with which defendant sexually penetrated the victim's anus, defendant was able to defend against the crime for which he was ultimately charged. Therefore, we conclude that the amendment did not unfairly surprise or prejudice defendant.

III. Scoring of Offense Variable 4

Defendant next argues that his sentences should be reversed because there is no evidence to support the trial court's decision to score ten points for Offense Variable (OV) 4 (psychological injury to the victim).

> A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). [*People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).]

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[4] *Willett* was remanded on other grounds. *People v Willett*, 414 Mich 970; 327 NW2d 71 (1982).

The offenses of which defendant was convicted—two counts of CSC I—were committed on May 7, 2000. Therefore, the legislative sentencing guidelines, which were enacted pursuant to MCL 769.34, were used to determine the recommended range of defendant's minimum sentence. The scoring of ten points for OV 4 is proper where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.24(1)(a).

Assuming, without deciding, that there was no evidence to support the trial court's scoring of OV 4, we conclude that any such error was harmless. Even if the trial court would have assessed defendant zero points for OV 4, his minimum sentences under the legislative guidelines would have been 126 to 262 months' imprisonment. MCL 777.62; MCL 777.21(3)(a). The trial court sentenced defendant to twenty to forty years' (240 to 480 months) imprisonment, which was within that range. An error in the scoring of a defendant's sentence under the legislative guidelines does not require reversal where the error was harmless. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002). Because defendant's sentences were within the appropriate guidelines range, any error in the scoring of OV 4 would have been harmless.

IV. Proportionality

Finally, defendant argues that he is entitled to resentencing because his sentences are not proportional to his offenses. Even assuming that the trial court erred in scoring ten points for OV 4, defendant's sentences were within the appropriate guidelines sentencing range. "Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality, if the sentence falls within the guidelines." *People v Pratt*, ___ Mich App ___; ___ NW2d ___ (2002) (Docket No. 228081, issued 12/17/02), slip op at 2-3. Because defendant's sentences fall within the appropriate legislative guidelines sentencing range, this Court may not consider a challenge to the proportionality of defendant's sentences.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood